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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 264.

DORA COLEMAN, *Appellant*,

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES

and

A. R. MACKEY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *Appellees*.

On Appeal From the United States District Court for the District of Columbia.

PETITION FOR REHEARING.

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I.

Both the opinion of the Court and the concurring opinion of Mr. Justice Frankfurter rest on the assumption that the issue in this case has been authoritatively determined by precedents of this Court, and that the only question posed by the appeal was whether or not to adhere to these earlier precedents. Of course, this Court has more than once held that prior decisions furnish no insuperable barrier to a re-

turn to fundamental constitutional principles in the light of re-examination of the Constitution.[1] *Smith* v. *Allwright*, 321 U. S. 649, 665 see cases collected in fn. 10 of the opinion.

But it was not necessary to go so far in the present case. Whatever may have impelled the Court to sanction a species of fascism for aliens in this country, it clearly was not compelled to do so by prior decisions of the Court.

No prior decision of this Court has held that aliens lawfully admitted for permanent residence and permanently domiciled in this country may be deported more than thirty years after their entry in this country on completely arbitrary grounds and without regard to our constitutional guarantees. On the contrary, the present decision repudiates the long line of decisions of this Court to the effect that a legally resident alien has sufficient claim to remain here, whether or not this claim be considered a "vested right", to prevent his expulsion without complying with the requirements of due process of law. *Japanese Immigrant Case*, 189 U. S. 86; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; cf. *Jordan* v. *De George*, 341 U. S. 223.

The majority opinion itself recognizes that the previous decisions upon which it principally relies dealt only with the power of Congress to exclude and the power of expulsion as an auxiliary remedy to enforce exclusion. (See fn. 15 of the opinion). The Court in those cases did not have before it and consequently did not pass upon the rights of lawfully admitted domiciled aliens.

The only analogue in history to the statute now before the Court is not the statutes involved in *Fong Yue Ting*, 149 U. S. 68 and similar cases, but rather the Alien Law of 1798. The Court has always been careful to indicate that nothing in its opinions should be held to justify the validity of that Act. *Chae Chin Ping* v. *United States*, 130 U. S. 581, 610-611; *United States ex rel Turner* v. *Williams*, 194 U. S. 279,

[1] For the views of the founding fathers on the rights of aliens under the Constitution see Madison in 4 Elliot, Deb. 554-556.

294-295. As recently as 1948, Justice Frankfurter, speaking for a Court divided 5-4 in sustaining the Alien Enemy Act of 1798 took great pains to distinguish between the Alien Enemy Act of 1798 and the Alien Act of the same year indicating that the constitutional problems posed by an act involving non-enemy aliens had no relation to those of an act limited to enemy aliens. *Ludecke v. Watkins*, 335 U. S. 160, 171. See also *United States ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537, where the same distinction was made between aliens seeking admission to the country, and resident aliens already lawfully admitted.

Thus the present decision for the first time in the history of the Court provides a justification to support the validity of the Alien Law of 1798. It does so by putting lawfully admitted, domiciled non-enemy aliens on the same footing as enemy aliens, and aliens seeking admission to the country. And the opinion reaches this conclusion on the fallacious ground that it is a long settled question which it does not choose to reopen.

Moreover, the rationale offered by the Court in support of its affirmance of the alleged rule that domiciled aliens may be deported without regard to constitutional guarantees, has in fact no application to the appellant and others situated like her. Contrary to the statement of the Court, the appellant is not a citizen of any other country. Her state of origin does not and will not recognize her as a citizen. It will not only not enter a diplomatic remonstrance against her deportation, but would not even accept her if ordered deported. See *Saksagansky* v. *Weedin*, 53 F. (2d) 13, 16.

Nor is there any substance to the argument that whatever consequences may befall the appellant is a result of her voluntary failure to seek citizenship. The appellant in fact did seek citizenship, and under the present state of the law, the present deportation proceeding is the sole barrier to her attaining citizenship. 8 U. S. Code secs. 705 (c), 729 (c); *United States* v. *Waskowski*, 158 F. (2d) 962. Indeed, the

record indicates that it was her very application for citizenship that gave rise to the deportation proceeding (R. 10).

Thus the appellant here has long ago abandoned any allegiance to any other state, and stands ready to formalize that abandonment and announce her allegiance to this government. The only obstacle to this step is the opposition of the government in the form of these deportation proceedings. In this posture, the Court informs the appellant that she is not entitled to the protections of the Constitution because she has not as yet asserted that allegiance. Although this ingenious trap for aliens may result, as Justice Frankfurter says, from "xenophobia in general", it can hardly be said to flow from the alien's own voluntary choice.

The opinion of the Court, in essence, deals with the problem of some hypothetical group of aliens who claim the protections of our Constitution while insisting on their allegiance to some foreign nation. But it ignores the cases of the aliens actually before it who present no such problem. The aliens whose cases are presently before the Court are far more typical of the large majority of aliens in this country, who were lawfully admitted for permanent residence, have made this country their home by cutting off all ties with the country of origin, have married citizens and begot citizens, than is the hypothetical group conjured up by the Court. Whatever special rules might be applicable to this exceptional group should not hold for the average resident alien who has and presents no conflict of allegiance.

It is this basic error in the opinion of the Court that has led it to repudiate all of its past decisions recognizing the constitutional rights of resident aliens in deportation proceedings, to furnish for the first time in the history of this Court a theoretical justification for the validity of the Alien Law of 1798, and to sanction the deportation of aliens solely on the ground of race or religion. Because of the unprecedented character of the opinion, and its serious consequences to all aliens, it is important that it be reconsidered

in the light of the realities of the alien problem in this country,[2] and not on the hypothetical basis posed by the opinion.

II

The opinion of the Court brushes aside consideration of the application of the First Amendment to the present case by observing that the First Amendment does not protect the advocacy of change by force and violence, apparently attributing to the appellant the view that this Court should overrule its decision in *Dennis* v. *United States*, 341 U. S. 494. But whatever view may be taken as to the correctness of the Court's decision in the *Dennis* case, that case has no application here. The appellant here has never advocated force and violence under any circumstances. She has never participated in any activities directed to that end. The *Dennis* case upheld the conviction of defendants whom a jury found had conspired to advocate force and violence, it did not uphold the conviction of others who did not so advocate or conspire.

If, as this Court states, the rationale of the *Dennis* case is that Congress may prohibit advocacy of violent change because the Constitution protects all peaceful efforts at change by press, speech or assembly, then the activities of the appellant here require constitutional protection. For the only activities engaged in by the appellant here were peaceable speech and assembly in behalf of equal rights for minority races, better working conditions and wages. Indeed, the failure of the Court and Congress to afford protection to these activities is to indicate to the appellant and aliens similarly situated that these avenues of change are closed so far as they are concerned, and that their only recourse may be to violence or other illegal activities.

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[2] Obviously, since our country, unlike the countries of Europe, was settled and built by immigrants who left the country of their origin to make a new home here, the experience and practice of European countries and the doctrine of international law arising from those practices, furnish no guide to the treatment of aliens here.

What the appellant seeks protection for is not the right to advocate violence, but the right to peaceable speech and assembly. Under the decisions of this Court, she is unquestionably entitled to that protection even if she exercises those rights together with Communists or as a member of the Communist Party, so long as she herself does not share or participate in the alleged unlawful purposes of the organization. *De Jonge* v. *Oregon*, 299 U. S. 353; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Herndon* v. *Lowry*, 301 U. S. 242; cf. *Bridges* v. *Wixon*, 321 U. S. 135.

Nor may she be deprived of protection for such rights on the apparent assumption of the opinion and the statute that all members of the Communist Party, past or present, advocate the overthrow of government by force and violence. For to deny the appellant rights on the basis of such a conclusive presumption is to make a mockery of any pretense that she may be protected in the exercise of these rights.

The opinion indicates that such a presumption may be justified on the dual grounds of security and the difficulty of proof if the burden were placed upon the government to prove with respect to each individual that he adhered to the prohibited advocacy of force and violence.[3]

The spirit and genius of American law is that each person is entitled to be treated before the law as an individual responsible for his own acts and conduct. One of our chief

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[3] The opinion indicates that the appellant's discontinuance of membership in the Communist Party has no significance in indicating the appellant's renunciation of the principles of force and violence, although the record indicates that the appellant never adhered to those principles even when a member of the Communist Party. In addition, the opinion's reference to an alleged policy of the Communist Party of expelling "alien members en masse" is inconsistent with the Court's acceptance on the same day of the allegation of the government that some aliens are presently active and leading members of the Communist Party. *Carlson* v. *Landon*, No. 35.

boasts is that we do not share the alleged practices of certain oriental countries of treating people as a conglomerate of faceless individuals, or as a nameless mass that can be lumped together for administrative purposes. Nor has this Court, prior to the present decision, ever sanctioned such a practice on the grounds either of security or difficulty of proof[4] the dual reasons advanced for this doctrine in the present case. The rule here applied repudiates completely our tradition of the integrity of the individual.

History has on more than one occasion offered examples where regimes have punished whole communities for acts of individuals. When the Nazis exterminated Lidice because of an act of sabotage by some resident of the town, they were no doubt motivated by considerations of the security of the Nazi regime and the difficult if not impossible problem of pinning the guilt on the specific individuals at fault. To the rest of the world it was an act of inhuman barbarity.

If, as the Court holds, Congress may presume that individuals who quit the Communist Party "left the party the better to serve it", logically, Congress may also presume that so-called fellow travellers who never joined the Communist Party failed to join it for the same purpose. By this logic Congress may, according to the Court, attribute the alleged unlawful purposes of the Communist Party to all present members, past members, "sympathizers", or perhaps members of so-called Communist front organiza-

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[4] The sole exception is the conduct upheld by the Court in *Hirabayashi* v. *United States*, 320 U. S. 81, and *Korematsu* v. *United States*, 323 U. S. 214. But the measures taken in those cases were justified solely as temporary emergency measures necessitated by the threat of imminent invasion of our Pacific Coast and the absence of time or opportunity to discriminate between the guilty and the innocent. This Court subsequently indicated that the doctrine of those cases had no vitality beyond the immediate emergency which gave rise to it, and that the Court would not sanction the doctrine as a permanent policy of government. *Ex parte Endo*, 323 U. S. 283. The present statute is clearly not of that temporary emergency character.

tions. No decision of the Court has ever gone so far as the present in permitting by legislative fiat the transfer to an individual of the alleged views and conduct of others.[5]

Since the opinion of the Court marks so great a departure from the previous decisions of this Court in guaranteeing rights under the First Amendment, and in insuring that under our Constitution each individual must be judged on the basis of his own conduct and activities, we respectfully urge the Court that such unprecedented views require the reconsideration of this Court before they be accepted as the final word of the Court on these questions.

Respectfully submitted,

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Certificate of Counsel.

I certify that the within and foregoing petition for rehearing is presented in good faith and not for delay.

DAVID REIN.

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[5] The opinion of the Court notes that the appellant did not challenge the finding below that the Communist Party during the period of her membership taught and advocated overthrow of the Government of the United States by force and violence. But the appellant, having no knowledge of the documents and the books upon which the government relied was hardly in a position to make such challenge. She did however testify as to her own beliefs and activities and her own knowledge, which should, under our constitutional system, be the relevant considerations.